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When Conducting a 'Superfund' Cleanup, Is the Remedial Investigation/Feasibility Study (RI/FS) as Performed by EPA (Environmental Protection Agency) and Other Agencies the Functional Equivalent of an Environmental Impact Statement Required by NEPA (National Environmental Policy Act)

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3103 THE RESPONSIBILITIES OF EPA AND OTHER FEDERAL AGENCIES TO COMPLY WITH NEPA WHEN UNDERTAKING A "SUPERFUND" TYPE CLEANUP

This report is part of the National Network for Environmental Management Studies under the auspices of the Agencywide Technology Transfer Staff of the U. S. Environmental Protection Agency. This paper discusses the issue of federal agency compliance with the National Environmental Policy Act when proposing a "Superfund" type cleanup. When conducting a "Superfund" cleanup, is the Remedial Investigation / Feasibility Study (RI/FS), as performed by EPA and other agencies, the functional equivalent of an Environmental Impact Statement required by NEPA?

Traditionally, the Courts have allowed EPA wide latitude in their interpretation of environmental statutes. EPA has responded to this freedom by developing procedures which differ from those required by NEPA in determining the affect of an agency proposal on the environment. So long as the results obtained by EPA when using the RI/FS process are substantially similar to those which would have been obtained had an environmental impact statement been prepared, the procedures are functionally equivalent and the agency action has been determined to be legal.

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MEMORANDUM

TO: Bill Franz
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Office of Emergency and Remedial Response
Environmental Protection Agency

FROM: Scot R. Campbell
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SUBJECT: I. The Legality of "Functional Equivalency" for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Actions in Light of the National Environmental Policy Act (NEPA).

II. The Responsibilities of EPA and Other Federal Agencies to Comply With NEPA when Undertaking a "Superfund" Type Cleanup.

I. ISSUE

When conducting a "Superfund" cleanup, is the Remedial Investigation / Feasibility Study (RI/FS) as performed by EPA and other agencies the functional equivalent of an Environmental Impact Statement required by NEPA?

CONCLUSION

Traditionally, the Courts have allowed EPA wide latitude in their interpretation of environmental statutes. EPA has responded to this freedom by developing procedures which differ from those required by NEPA in determining the affect of an agency proposal on the environment. So long as the results

obtained by EPA when using the RI/FS process are substantially similar to those which would have been obtained had an EIS been prepared, the procedures are functionally equivalent and the agency action has been determined to be legal.

DISCUSSION

Federal agencies are required to cleanup waste sites on their lands as a result of the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 and the Superfund Amendments and Reauthorization Act (SARA) in 1986. If the cleanup and final disposal option selected by the agency is a "major action" significantly affecting the environment, the agency would be required to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). The Environmental Protection Agency (EPA) has determined, however, that compliance with the Remedial Investigation / Feasibility Study (RI/FS) process constitutes compliance with the NEPA requirements. The RI/FS process is the "functional equivalent" of an EIS. This memorandum examines the legal issues raised by this conclusion.

A. ENVIRONMENTAL IMPACT STATEMENTS

When a federal agency proposes to undertake, fund, or authorize an activity that will significantly affect the quality of the human environment, the agency must prepare a detailed

statement of the environmental effects of the proposal.[1] The scope of this statement is outlined in NEPA:

> all agencies of the Federal Government shall-
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on-
> >
> > > (i) the environmental impact of the proposed action,
> > >
> > > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> > >
> > > (iii) alternatives to the proposed action,
> > >
> > > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> > >
> > > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[2]

The adequacy of the EIS and the agency's compliance with NEPA procedures in preparing it are the most litigated issues in environmental law. Courts have established three primary purposes for an EIS. First, it must provide decisionmakers with information on the environmental implications of a proposed action in sufficient detail to aid in making the decision to

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1. See generally D. Mandelker, NEPA LAW AND LITIGATION §§ 8.01-8.34 (1984), N. Orloff & G. Brooks, THE NATIONAL ENVIRONMENTAL POLICY ACT 63-176 (1980).

2. 42 U.S.C. § 4332 (1986).

proceed with the action. Second, the EIS must provide the public with a meaningful disclosure of the proposed action's environmental impacts. Finally, the EIS must demonstrate the agency's development and consideration of a reasonable range of alternatives.[3]

The Council on Environmental Quality (CEQ) has established guidelines for implementing these requirements.[4] These guidelines state that an EIS should contain:

> 1. the underlying purpose for its preparation.
> 2. succinct descriptions of the environment of the area(s) to be affected.
> 3. based on the information and analyses of the affected area(s) present the environmental impacts of the proposal and all reasonable alternatives.
> a. any adverse impacts which cannot be avoided
> b. the relationship between short and long term uses of the environment
> c. any irreversible or irretrievable commitments of resources.
> d. possible conflicts between the proposed action and other Federal, regional, State, and local plans and policies.
> 4. alternatives which have been considered in detail.
> 5. appropriate mitigation measures not already included in the proposed action or alternatives.
> 6. the alternative of no action.[5]

Courts have recognized that in some situations formal compliance with NEPA requirements is unnecessary.[6]

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3. D. Sive & F. Friedman, A PRACTICAL GUIDE TO ENVIRONMENTAL LAW, § 7.02(e) (1987).

4. 40 C.F.R. §§ 1502-1508.28 (1987).

5. Id §§ 1502.12-1502.16.

6. There are five major exceptions. First, actions that do not satisfy NEPA's triggering requirement "major federal actions significantly affecting the quality of the human environment" are exempt. Second, since "NEPA was not intended to repeal by

B. FUNCTIONAL EQUIVALENCY

The functional equivalency doctrine was first proposed by the Court of Appeals for the District of Columbia in Portland Cement Association v. Ruckelshaus.[7] The case recognized a narrow exemption for EPA when the agency was establishing stationary source standards under the Clean Air Act.[8] It has subsequently "been applied to several other environmental statutes, not because of any purported need for haste, but simply because the environmental impact statement requirement was deemed to be superfluous in view of the EPA's otherwise equivalent action through consideration of environmental concerns under the statutes."[9] Courts have given EPA wide latitude in this area. The doctrine has been extended to EPA actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[10]; the Ocean

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implications any other statute," United States v. SCRAP, 412 U.S. 669, 694 (1973), when another federal statute expressly provides for exemptions from NEPA's requirements, the Act is inapplicable. Third, when a clear and unavoidable conflict in statutory authority exists, NEPA must give way. Flint Ridge Development Co. v. Scenic Rivers Assn., 426 U.S. 776 (1976). Fourth, in emergency situations an agency may take actions that will cause significant effects on the environment without complying with NEPA. National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986). The fifth exception - the functional equivalency exception - is the focus of this paper.

7. 486 F.2d 375 (D.C. Cir. 1973).

8. See 42 U.S.C. § 7411.

9. Warren County v. North Carolina, 528 F. Supp. 276, 287 (N.C. 1981).

10. Environmental Defense Fund v. EPA, 489 F.2d 1247 (D.C. Cir. 1973).

Dumping Act[11]; the Resource Conservation and Recovery Act (RCRA)[12]; the Marine Protection, Research and Sanctuary Act of 1972[13]; and the Toxic Substance Control Act (TSCA).[14]

The courts exempted EPA from formal compliance with NEPA because the authorizing statute provides substantive and procedural standards that ensured full and adequate consideration of the environmental issues.[15] "[W]here federal regulatory action is circumscribed by extensive procedures, including public participation, for evaluating environmental issues and is taken by an agency with recognized environmental expertise, formal adherence to the NEPA requirements is not required unless Congress has specifically so directed."[16] The policy behind the functional equivalence exemption for EPA was set out in Portland Cement Association v. Ruckelshaus where the court stated:

> "The policy thrust toward exemption of the environmental agency is discernible from these factors, taken in combination: (1) An exemption from NEPA is supportable on the basis that this best serves the objective of protecting the environment which is the purpose of NEPA. (2) This comes about because NEPA operates, in protection of the environ-

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11. Maryland v. Train, 415 F. Supp. 116, 121 (D. Md 1976).

12. Alabamians for a Clean Environment v. Thomas, No. CV 87-0797-W (N.D. Ala. Dec. 7, 1987).

13. See Maryland v. Train, 415 F. Supp. 116, 121-22 (D. Md. 1976), rev'd on other grounds, 556 F.2d 559 (4th Cir. 1977).

14. See Warren County v. North Carolina, 528 F. Supp. 276, 286-87 (E.D. N.C. 1981).

15. Environmental Defense Fund, Inc. v. E.P.A., 489 F.2d 1247, 1257 (D.C. Cir. 1973).

16. State of Maryland v. Train 415 F. Supp. 116, 122 (D. Md. 1976).

ment, by a broadly applicable measure that only provides a first step. The goal of protecting the environment requires more than NEPA provides, i.e. specific assignment of duties to protection agencies, in certain areas identified by Congress as requiring extra protection. (3) The need in those areas for unusually expeditious decisions would be thwarted by a NEPA impact statement requirement. (4) An impact statement requirement presents the danger that opponents of environmental protection would use the issue of compliance with any impact statement requirement as a tactic of litigation and delay."[17]

The court concluded that the procedure required for functional equivalence must include: (1) a statement of the reasons for the proposal and underlying balancing analysis; (2) public hearing or some other opportunity for comment; (3) a Record of Decision document to allow the courts to scrutinize the analysis of the environmental considerations, thus assuring the agency arrived at a reasoned decision.[18] The functional equivalency exception does not require an agency to address separately each element of an EIS analysis where the agency's authorizing statute provides for an orderly review of diverse environmental factors.[19]

C. REMEDIAL INVESTIGATION / FEASIBILITY STUDY

The procedure by which EPA performs the functional equivalent of an EIS is a Remedial Investigation / Feasibility Study (RI/FS). If a preliminary assessment of a toxic waste site

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17. Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 385 (D.C. Cir. 1973).

18. Id. at 386.

19. See Amoco Oil v EPA, 501 F.2d 722, 750 (D.C. Cir. 1974); Pacific Legal Foundation v. Andrus, 657 F.2d 829, 834 n.4 (6th Cir. 1981).

has been completed and a removal action is not required or is not sufficient, an RI/FS is conducted by the lead agency, generally the EPA or an equivalent state agency.[20] SARA authorizes private parties to conduct RI/FS if EPA approves the work and the private party agrees to reimburse EPA for the cost of retaining an EPA expert to oversee the study.[21] The RI/FS process is governed by EPA regulations.

The "remedial investigation" (RI) determines the general scope of the project. The purpose of this initial analysis is to assess the potential threat to public health and welfare or the environment, the types of removal or remedial measures possible, and to set priorities for implementation of the measures.[22] The RI provides a detailed physical assessment of conditions and site characterization data that serves as the basis for the "feasibility study" (FS). The initial FS should contain at least one alternative in each of the five catagories;

1. alternatives for offsite treatment or disposal of hazardous waste.
2. alternatives that attain applicable public health and environmental standards (institutional analysis).
3. alternatives that exceed applicable public health and environmental standards, when possible.
4. alternatives that may not reach or exceed applicable public health and environmental standards but will reduce the threat from hazardous substances and protect public health and welfare and the environment.

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20. D. Stever, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE, § 6.06[2][d][ii][A] (1986).

21. CERCLA, § 104(a), 42 U.S.C. § 9604(a).

22. 40 CFR § 300.68(e).

5. no action alternative.[23]

These initial alternatives are screened to narrow the list of potential remedial actions for further detailed analyses. The criteria for screening are: (1) costs - including operation and maintenance costs; (2) acceptable engineering practices - the remedy must be feasible, applicable to the problem, and reliable; (3) effectiveness - the extent to which each alternative provides protection to the public health and the environment.[24] Following this preliminary screening, the remaining alternatives undergo further technical, cost, institutional, public health, and environmental analysis. A summary of the results and a final Feasibility Report is prepared.

The public is provided an opportunity to comment even when the RI/FS have been privately completed. SARA requires EPA to publish notice and give the public an opportunity to comment on the proposed remedial action.[25]

Utilizing the RI/FS information, EPA produces a record of decision (ROD) which documents their decision and contains alternative cleanup plans for each site.

The RI/FS process thus requires a preliminary assessment of the alternative remedial methods and of the environmental, technical, and economic impacts of the alternatives. The process also ensures that the public has an opportunity to comment on the

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23. 40 CFR § 300.68(f).

24. 40 CFR § 300.68(g).

25. CERCLA, § 117, 42 U.S.C. § 9617.

alternatives before one alternative is selected. Finally, the agency prepares a decision document that explains why the selected alternative was chosen.

In determining whether an agency's actions are "functionally equivalent" to an EIS, courts take a hard look at the record. Petitioners must establish that there was a procedural defect in the agency procedures or that the agency's substantive decision was arbitrary, capricious or an abuse of discretion.[26] The agency must supply a complete record showing they met the "five core NEPA issues" outlined in §102(2)(C) of NEPA: the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources."[27] If "an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."[28]

If the procedures as outlined for conducting an RI/FS are

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26. Foundation on Economic Trends v. Thomas, 637 F. Supp. 25, 28 (D.D.C 1986). See also United States v. Seymour Recycling Corp., 679 F. Supp. 859 (S.D. Ind. 1987); South Terminal Corp. v. EPA 504 F.2d 646 (5th Cir. 1974); Ethyl Corp. v. EPA 541 F.2d 1 (D.C. Cir. 1976).

27. Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973).

28. Id. at 1257. Cf. Maryland v. Train, 415 F. Supp. 116 (D. Md 1976) (same requirements for functional equivalence under the Ocean Dumping Act).

followed, and the final decision is made by an agency charged with protecting the environment, such as the EPA, then the result of the RI/FS is functionally equivalent to an EIS.

II. ISSUE

What are the responsibilities of EPA and other federal agencies to comply with NEPA when undertaking a "Superfund" type cleanup.

CONCLUSION

Federal agencies should be exempt from NEPA requirements for federal facility remedial cleanups. The results of an RI/FS conducted in consultation with EPA is functionally equivalent. Allowing agencies to conduct an RI/FS rather than both an EIS and RI/FS would eliminate any duplicative requirements had the agency been required to conduct both procedures. Eliminating duplication effectuates congressional intent that "superfund" not be bogged down in the courts, and that cleanups be conducted quickly and cost effectively.

DISCUSSION

NEPA is a procedural statute intended to force federal agencies to take the environment into consideration when making decisions. CERCLA, on the other hand, contains both substantive and procedural provisions. The statutory cleanup standards in

CERCLA compel EPA to apply the "legally applicable or relevant and appropriate" cleanup standard limiting the agency's discretion. Under NEPA, federal agencies may conduct the EIS themselves or subcontract the actual performance of an EIS while maintaining control of the final product. CERCLA provides a similar process whereby an agency or a subcontractor of that agency may perform the RI/FS in consultation with EPA. Under this provision EPA maintains the right to select the final remedial action if it disagrees with the other federal agency. It is this control over the final action that allows other agencies to perform RI/FS in superfund toxic cleanups rather than go through the time and duplication of doing both an EIS and an RI/FS.

A. CERCLA/SARA

CERCLA, the "superfund" law, was enacted principally to establish federal authority and funding to respond to hazardous substance emergencies and clean up leaking hazardous waste disposal sites without waiting for a judicial or administrative determination of liability.[29]

The EPA promulgated the National Contingency Plan (NCP) as a regulation to establish procedures and standards for responding to releases of hazardous substances. The NCP divides removal actions into two catagories - immediate removals and planned

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29. Lone Pine Steering Comm. v. E.P.A., 600 F. Supp. 1487, 1489 (D.N.J. 1985).

removals.[30] Immediate removals are appropriate where action within hours or days may be necessary to prevent significant harm to human health or environment. Planned removals are appropriate where an expedited, although not necessarily immediate, response may be required. Unless an emergency exists, neither immediate nor planned removals may continue beyond 12 months or after the expenditure of $2 million. Because of the need for quick response, it would be impossible for agencies to prepare an EIS prior to a removal action. This statutory conflict exemption to NEPA requirements has long been recognized.[31]

EPA may also take "remedial action" under section 104 of CERCLA to clean up a site. Remedial actions involve long-term actions consistent with a permanent remedy taken instead of or in addition to removal actions to prevent or minimize the release of hazardous substances.[32] Remedial actions, unlike removal actions, do not require an immediate response and therefore, do not qualify for the "emergency" or statutory conflict exception to NEPA. It is with these remedial actions that EPA applies the functional equivalent to an EIS. In Lone Pine Steering Comm. v. E.P.A., the Court recognized that remedial actions should be

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30. 42 U.S.C. § 9605 (1986).

31. Flint Ridge Dev. Co. v. Scenic Rivers Assoc., 426 U.S. 776, 788 (1973); see also Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 380-81 (D.C. Cir. 1973), Mobile Oil Corp. v. F.T.C. 430 F. Supp. 855,869-70 (1977), Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1385-86 (D.C. Cir. 1981).

32. CERCLA § 101(24), 42 U.S.C. § 9601(24) (1986).

conducted as soon as circumstances permit. "It should be obvious that every day's delay in dealing with a hazardous waste site entails risks. Just because unavoidable delays are required to plan and implement a response does not mean that Congress contemplated the additional delays which judicial review would entail."[33]

Courts have not required EPA to prepare an EIS, but have instead allowed them to apply their "functional equivalent" doctrine to CERCLA removal and remedial actions.[34] Had Congress intended to apply NEPA procedures to CERCLA actions they could have done so in the SARA amendments of 1986. Congress is deemed to have knowledge of how their statutes are being interpreted. If they disagree with the interpretation placed on them by the courts or agencies the statutes can be amended.[35] "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"[36] CERCLA was enacted in 1980.

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33. Lone Pine Steering Comm. v. E.P.A., 600 F.Supp 1487, 1499 (D.N.J. 1985).

34. Id at n.2, See also U.S. v Outboard Marine Corp. 789 F.2d 497,500 (1985).

35. See Dow Chemical Co. v Train, 423 F. Supp. 1359, 1363 (E.D. Mich. 1976), Merrill Lynch, Pierce, Fenner & Smith v Curran, 456 U.S. 353, 382 n. 66 (1982).

36. Merrell v, Thomas, CV-84-6185-E at 7 (9th Cir. 1986) (quoting Commodity Futures Trading Comm'n v. Schor, 106 S.Ct. 3245, 3255 (1986), quoting NLRB v. Bell Aerospace Co., 416 U.S.

After three years of debate, CERCLA was amended in 1986 by SARA. Had congress intended NEPA to specifically apply to Superfund actions a provision could have been included in SARA. Instead congress supplied specific procedures that must be followed.

In section 104(a) of SARA Congress recognized CERCLA was different than all preceding environmental legislation. It allows parties other than EPA to conduct a RI/FS. To require other agencies and parties to do environmental impact statements as well would be a needless duplication. The RI/FS is conducted under the close supervision of the EPA. "In carrying out Superfund remedial actions, it is EPA's policy to provide opportunity for public review and to follow procedures that are functionally equivalent to those afforded by the National Environmental Policy Act."[37] To allow other agencies to prepare only an RI/FS, EPA must insure the RI/FS conducted by other parties and agencies comply with the standards set forth in NEPA.

267, 274-275 (1974) (footnotes omitted)).

37. W. Hedeman & A. Hirsch, Memoramdum, Coordination Between Regional Superfund Staffs and OFA Regional Counterparts on CERCLA Actions, (Oct. 29, 1984). (available from EPA).